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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT L. YOUNG,

Plaintiff,

v.

ILLINOIS UNION INSURANCE COMPANY; ACE WESTCHESTER SPECIALTY CLAIMS; and DOES 1 through 50, inclusive,

Defendants.

Case No.: C07-05711 SBA

ILLINOIS UNION INSURANCE COMPANYS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hon. Saundra B. Armstrong

[Concurrently filed with Declarations of Darren Le Montree and Michael Leest]

DATE: August 26, 2008
TIME: 1:00 p.m.
CTRM: 3

TO THIS HONORABLE COURT, ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 26, 2008 at 1:00 p.m., or as soon thereafter as this matter may be heard, in Courtroom 3 of the above-entitled Court, located at 1301 Clay Street, Suite 400 S, Oakland, CA 94612-5212, Defendant ILLINOIS UNION INSURANCE COMPANY ("Illinois Union or "Defendant") will move the Court for summary judgment on the Complaint of Plaintiff Robert L.

Young ("Young") in the above-entitled action. Alternatively, Defendant will move for summary adjudication in its favor as to each cause of action set forth in the operative complaint and as to Young's claims for attorneys' fees and punitive damages.

The Motion is based upon the uncontroverted facts supporting the conclusions that Defendant did not violate a contractual duty, implied covenant of good faith or fiduciary duty in connection with Young's request for coverage under the subject Policy, that no coverage is afforded to Young therein, and that summary judgment and/or summary adjudication should be granted in favor of Defendant as a matter of law.

The Motion will be based upon this Notice, the attached Memorandum of Points and Authorities, the concurrently Declaration(s) of Darren Le Montree and Michael Leest, the Separate Statement of Uncontroverted Facts and Conclusions of Law filed separately and concurrently with this Motion, the complete Court records and file in this matter, and upon such further oral and documentary evidence that may be presented at the time of hearing on this Motion.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on July 1, 2008.

Dated: July 21, 2008

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: _____
Herbert P. Kunowski, Esq.
Darren Le Montree, Esq.
Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an insurance coverage dispute between Robert L. Young ("Young") and Illinois Union Insurance Company ("Illinois Union") arising out of Young's demand that its insurer, Illinois Union, defend and indemnify it in a legal malpractice lawsuit filed against him by Raybern Foods, Inc. ("the Underlying Action").[1]

The undisputed facts demonstrate that the allegations in the Underlying Action are not potentially covered by the insurance policy at issue, that an exclusion as well as the Policy's definition of Wrongful Acts (lack of an insured capacity) apply to expressly preclude coverage for the claim. By way of the instant motion, Illinois Union requests that the Court find that: 1) Illinois Union had no duty to defend or indemnify Young in the Underlying Action; 2) that Illinois Union is not liable for breach of contract and breach of the covenant of good faith and fair dealing (i.e., "bad faith") or for any of Young's remaining causes of action which are either improper theories and/or fail in tandem with the absence of coverage; 3) that Young is not entitled to exemplary and/or punitive damages; and (4) that Young is not entitled to "Brandt" attorneys' fees.

II. UNCONTROVERTED MATERIAL FACTS

A. UNDERLYING ACTION

On February 17, 2004, TRI Commercial Real Estate Services, Inc. ("TRI") filed an action against its former client, Raybern Foods, Inc. ("Raybern") and Bernard Viggiano ("Viggiano") in the Superior Court of California, County of Alameda, Case No. RD 041414329 (the "Underlying Action"). In this action TRI

[1] Defendant respectfully requests this Court to take judicial notice of relevant pleadings from the Underlying Action, copies of which are attached hereto as exhibits in support of this Motion.

was seeking to recover its commission as a broker with respect to Raybern's marketing of a business opportunity in the form of a sale, merger, royalty agreement or strategic alliance with a third party. (See Ex. 1).

On March 23, 2005, Raybern filed a Cross-Complaint against TRI, John Fults and Young, individually and doing business as the Law Offices of Robert L. Young ("Raybern Cross-Action"). (See Ex. 2). As against Young, the Raybern Cross-Action alleged that Young was at all relevant times a California attorney and sole proprietor of the Law Offices of Robert L. Young. (Ex. 2, ¶ 4). Raybern further alleged that it retained the legal services of Young in early 2001 in connection with the formation of a strategic business alliance with a separate entity, Ross & Shore. (Ex. 2, ¶ 6). Raybern further contended that at the time it retained Young and the Law Offices of Robert L. Young, it was unaware of the fact that Young was serving as an officer/director of TRI. (Ex. 2, ¶ 8). Raybern alleged causes of action against Young for breach of fiduciary duty, legal malpractice (professional negligence) and negligence.

On July 26, 2005, in response to a demurrer, Raybern filed a First Amended Cross-Complaint. (See Ex. 3). The First Amended Cross-Complaint included a separately plead cause of action against Young for breach of fiduciary duties allegedly owed to Raybern by Young "[a]s Raybern's attorney." (Ex. 3, ¶ 12). The First Amended Cross-Complaint also elaborated in further detail Young's alleged legal malpractice in providing legal services below the standard of care for legal professionals in that he allegedly failed to fully disclose his relationship with TRI in contradiction of the Rules of Professional Conduct, failed to disclose an ongoing conflict of interest, and failed to provide adequate drafting of the operative legal documents in Young not protecting Raybern's stated goal of ensuring that Rose & Shore would be handling all of its manufacturing. (Ex. 3, ¶ 16).

On August 24, 2005, Young filed a Cross-Complaint against TRI and John

Fults ("Fults") for equitable indemnity, apportionment of fault, express indemnity and declaratory relief. (See Ex. 4). On September 19, 2005, TRI and Fults filed a Cross-Complaint against Young for breach of fiduciary duty, legal malpractice, indemnity, contribution and declaratory relief. (See Ex. 5).

B. THE COVERAGE DISPUTE

Through correspondence dated June 7, 2005, TRI's counsel Albert E. Cordova provided Illinois Union with a copy of Raybern's Cross-Complaint filed in the Raybern Action along with a series of letters between Young and TRI. (See Ex. 6).

Through correspondence dated July 6, 2005 to Andrew Murbach of TRI, Illinois Union advised that there was no coverage for TRI, Fults or Young in connection with the Raybern Action based on acts which were not performed in a covered capacity and also the application of Exclusion (q) of the Policy, which bars coverage for any Claim "...in any way relating to any act, error or omission in connection with performance of any professional services..." (See Ex. 7).

Young disputed Illinois Union's coverage position primarily on the grounds that the Raybern Action recognized that Young was a director and officer of TRI--even though his duty to disclose an actual or potential conflict of interest arose in his capacity as an attorney for Raybern. Young also contended that the Policy's General Terms and Conditions afforded him a defense even if coverage was barred entirely by an applicable exclusion. Illinois Union reiterated its coverage denial and Young filed suit against Illinois Union on May 30, 2007, in the Superior Court of California, County of Alameda (the "Complaint"). Illinois Union removed the action based upon 28 U.S.C. § 1332. The Complaint contains nine causes of action as follows: (1) Breach of Contract, (2) Breach of the Covenant of Good Faith and Fair Dealing, (3) Breach of Fiduciary Duty, (4) Constructive Fraud, (5) Intentional Infliction of Emotional Distress, (6) Negligent Infliction of Emotional Distress, (7)

Intentional Misrepresentation, (8) Negligent Misrepresentation, and (9) Declaratory Relief. Young seeks reimbursement of Loss [about $300,000 in defense fees and costs plus $20,000 paid in settlement of the claim] incurred in the Raybern Action, punitive and exemplary damages, as well as attorneys' fees and costs.

III. ARGUMENT

A. TO AVOID SUMMARY JUDGMENT, YOUNG MUST PRESENT EVIDENCE CREATING A GENUINE ISSUE OF FACT FOR TRIAL

Federal Rule of Civil Procedure 56(c) provides for the granting of summary judgment where there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." In seeking either summary judgment or summary adjudication, the moving party has the burden to establish that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). Once the moving party has met its burden -- either by presenting evidence that, if uncontradicted, would entitle it to a directed verdict at trial, or by demonstrating a lack of evidence for the nonmoving party's case -- Rule 56(e) shifts to the nonmoving party the burden of presenting facts showing a genuine issue of fact for trial. *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 950-52 (9th Cir. 1978).

B. PRINCIPLES OF POLICY INTERPRETATION

An insurance policy is a contract, and the insured is responsible for reading the policy and knowing its contents. *National Auto. & Cas. Ins. Co. v. Stewart,* 223 Cal.App.3d 452, 458 (1990). An exclusion in an insurance policy will be upheld so long as it is unambiguous, plain and conspicuous. These are questions of law. *Id.; Producers Dairy Delivery Co. v. Sentry Ins. Co.,* 41 Cal.3d 903, 912 (1986). An "ambiguous" provision is one that is capable of two or more constructions, both of which are reasonable. *Producers Dairy, supra,* 41 Cal.3d at 912; *National*

Auto, supra, 223 Cal.App.3d at 458; *Suarez v. Life Ins. Co. of North America*, 206 Cal.App.3d 1396, 1406 (1988); Cal. Evid. Code § 310. Words in an insurance policy must be read in their ordinary sense, and any ambiguity cannot be based on a strained interpretation of policy language. *Producers Dairy, supra,* 41 Cal.3d at 912. "[I]f the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 822 (1990).

Moreover, the policy must be considered as a whole, and in relation to the concrete circumstances of the particular case. *Herzog v. National Am. Ins. Co.*, 2 Cal.3d 192, 198-99 (1970); *Producers Dairy, supra,* 41 Cal.3d at 916; *Blumberg v. Guarantee Ins. Co.* 192 Cal.App.3d 1286, 1296 (1987).

C. ILLINOIS UNION IS ENTITLED TO SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Summary judgment is appropriate in an insurance case where a question of insurance coverage can be determined as a matter of law on undisputed facts. *Montrose Chemical Corporation of California v. Superior Court,* 6 Cal.4th at 287, 298 (1993). Thus, summary judgment is appropriate in this action because the undisputed facts demonstrate as a matter of law that Illinois Union's policy does not provide coverage for Young in the Underlying Action.

1. EXCLUSION (Q) OF THE DIRECTORS AND OFFICERS COVERAGE SECTION OF THE POLICY BARS COVERAGE TO YOUNG FOR THIS CLAIM

Illinois Union issued to TRI a Business and Management and Indemnity Policy, No. BMI200116061, with Directors and Officers and Employment Practices Coverage, effective August 1, 2004 to August 1, 2005, on a claims made and reported basis ("the Policy") (Ex. 8).

Under the Directors & Officers Coverage Section, the Insuring Clause of the Policy provides as follows:

The Insurer shall pay on behalf of the Directors and Officers Loss from any Claim made against the Directors and Officers during the Policy Period for a Wrongful Act. (Ex 8, Clause A.1, page D&O-1)

The Policy defines "Claim" to mean:

(a) any written or oral demand for damages or other relief against any of the Insureds and (b) a judicial, administrative or arbitration proceeding initiated against any of the Insureds in which they may be subjected to a binding adjudication of liability for damages or other relief, including any appeal therefrom.
(Ex 8, Clause B.2, page D&O-1)

At Section (B)(9), "Wrongful Act," is defined as:

Wrongful Act with respect to a director or officer means any actual or alleged error, omission, misleading statement, neglect, breach of duty or act by:

(i) a director or officer or employee of the Company or the functional equivalent to a director or officer of the Company, while acting in their capacity as such, or any matter claimed against any Director and Officer solely by reason of his or her serving in such capacity; and

(ii) a director or officer, trustee, governor, executive director or similar position of any Outside Entity where such service is with the knowledge and consent of the Company.
(Ex 8, Clause B.9, page D&O-2)

"Directors and Officers" is defined at Section (B)(5) as:

all persons who were, now are or shall be: (a) directors, officers, or employees of the company, and (b) the functional equivalent to directors or officers of the Company in the event the Company is incorporated or domiciled outside the United States, including their estates, heirs, legal representatives or assigns in the event of their death, incapacity or bankruptcy. " (Ex 8, Clause B.5, page D&O-1)

Exclusion (q) contained in Endorsement No.2 of the Policy provides:

Young breached fiduciary duties he owed to it as an attorney and that Young failed to competently perform legal services with respect to drafting the operative agreements. The aforementioned conduct does not constitute Wrongful Acts committed by Young in the capacity as a director or officer of TRI.

Moreover, Young was asked in written discovery in the instant action to "[I]dentify with particularity each Wrongful Act alleged against Plaintiff [Young] in the CLAIM [Raybern Action] which did not arise out of, or result from or in any way involve Plaintiff's service as legal counsel to Raybern Foods, Inc." (Ex. 10, p. 2). After asserting various objections, Young responded by citing broadly to Raybern's Cross-Complaint, Raybern's First Amended Cross-Complaint and the Cross-Complaint of TRI and Fults. Young also cited to the definition of "Wrongful Acts" contained in the Policy. Young did not cite to any specific paragraphs of the above-referenced Cross-Complaints nor did he reference any specific facts alleged against him in the Raybern Action which did not arise out of or in any way involve his service as an attorney for Raybern. (See Ex. 10, pages 2-3.)

3. THE RAYBERN ACTION AGAINST YOUNG DID NOT ALLEGE ANY WRONGFUL ACTS UNDER THE EMPLOYMENT PRACTICES COVERAGE SECTION

Young has suggested that the Employment Practices Coverage Section may somehow afford coverage. The Insuring Clause in that Section provides: "Insurers shall pay on behalf of the Insureds Loss resulting from any Claim first made during the Policy Period for a Wrongful Act." (See Ex. 8, Clause A.1, page EPL-1). "Wrongful Act" is defined therein to mean any actual or alleged:

a) violation of any federal, state, local or common law, prohibiting any kind of employment-related discrimination, or

b) harassment, including any type of sexual or gender harassment as well as racial, religious, sexual orientation, pregnancy,

disability, age, or national origin-based harassment and including workplace harassment by any non-employee, or

c) abusive or hostile work environment, or

d) wrongful discharge or termination of employment, whether actual or constructive, or

e) breach of an actual or implied employment contract, or

f) wrongful failure or refusal to hire or promote, or wrongful demotion, or

g) wrongful failure or refusal to provide equal treatment or opportunities, or

h) defamation, libel, slander, disparagement, false imprisonment, misrepresentation, malicious prosecution, or invasion of privacy, or

i) wrongful failure or refusal to adopt or enforce adequate workplace or employment practices, policies or procedures, or

j) wrongful, excessive or unfair discipline, or

k) wrongful infliction or emotional distress, mental anguish, or humiliation, or

l) Retaliation, or

m) negligent hiring or negligent supervision of others in connection with a) through 1) above, but only if employment related and claimed by or on behalf of any Employee and only if committed or allegedly committed by any of the Insureds in their capacity as such.

(See Ex. 8, clause B.11, page EPL-2.)

The Claim against Young in the Underlying Action is devoid of any Wrongful Acts alleged which would trigger coverage under the Employment Practices Coverage Section. Accordingly, no coverage is afforded under this Section as a condition precedent to coverage has not been satisfied.

4. CLAUSE (L) DOES NOT PROVIDE FOR A DUTY TO DEFEND AN UNCOVERED CLAIM

Perhaps finally realizing that the Policy's terms, conditions and exclusions do not afford coverage for the Claim against him in the Underlying Action, Young appears to have focused his coverage argument on the contention that he was entitled to a defense under the Policy even if an exclusion entirely bars coverage

for the Claim. The premise of Young's argument is a misconstruction of the Policy's General Terms and Conditions.

Clause L of the General Terms and Conditions section of the Policy provides in pertinent part as follows:

> L. Settlements and Defense
>
> ...2. Insurer shall have the right and duty to defend any Claim and such right and duty shall exist even if any of the allegations are groundless, false or fraudulent. The Parent Company shall have the right to assume the duty to defend any Claim provided Insurers consent in writing to such assumption.
> (Ex. 8, Clause L2, pages GT & C-3).

Note that pursuant to Clause A of the General Terms and Conditions (Severability of General Terms and Conditions), "[e]xcept for the General Terms and Conditions below or unless stated to the contrary in any Coverage Section, the terms and conditions of each Coverage Section apply only to that Coverage Section and shall not be construed to apply to any other Coverage Section."
(Ex. 8, Clause A, pages GT & C-1).

Young seeks to argue that the duty to defend provision of Clause L (2) affords a duty to defend regardless of whether the Claim is covered under any coverage section within the Policy. Pursuant to the structure of the Policy, the severability of the General Terms and Condition and common sense, this argument must fail.

A similar argument was advanced in the case of *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd.,* 148 Cal.App.4th 976 (2007). In *Golden Eagle*, authored by Justice Croskey, the Court held that a supplementary payments clause in a commercial general liability policy did not constitute an obligation independent of the duty to defend.

That court cited to *Amex Assurance Co. v. Allstate Ins. Co.,* 112 Cal. App.4th 1246 (2003), wherein the insured sought to erroneously misread the term

"any suit" as applied to an "Additional Protection" clause in a homeowner's policy (analogous to a supplemental payment provision). The *Amex* court held that the insured's reading of the clause took the words out of context and determined that the provision did not apply in the absence of a duty to defend. *Id.* at. 1253.

The *Golden Eagle* court held that "where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense." *Id.* at 995. The court further reasoned that to read the supplemental payments clause otherwise "conflicts with common sense, is contrary to the public policy of encouraging rather than discouraging liability insurers to provide a defense to an insured, and obviously would not be within the objectively reasonable expectations of any party to the policy." *Golden Eagle,* 148 Cal.App. 4th at 998.

Another basic principle of policy interpretation is that the policy must be read in its proper context as one unified document. *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1265 (1992). Here, Young's suggested interpretation belies this precept in that it requires a forced reading of a portion of the policy out of the context of the entire document and which ignores the framework and organizational scheme of the Policy. As the court found in the *Golden Eagle* and *Amex* cases discussed herein, reading the Policy pursuant to Young's argument belies common sense and judicially recognized construction.

5. BECAUSE NO COVERAGE IS AFFORDED FOR THE UNDERLYING ACTION AGAINST HIM, YOUNG HAS NO VIABLE CAUSES OF ACTION FOR BREACH OF CONTRACT OR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AS A MATTER OF LAW

In order for Young to assert a breach of contact claim against Illinois Union, he must demonstrate the existence of a right to benefits under the terms of the Policy at issue. However, because the underlying matter against Young was

not covered and its request for Policy benefits was properly denied, Young cannot as a matter of law establish the critical element of breach.

Furthermore, Young cannot establish a bad faith claim against Illinois Union entitling him to extra-contractual damages because the uncontroverted facts show that Illinois Union did not act unreasonably and that its determination was afforded under a reasoned application of the Policy's terms and conditions. And, in the absence of any underlying coverage, there is no conceivable liability that Young could allege against Illinois Union on any theory of "bad faith." See, e.g, *Waller v. Truck Ins. Exchange, Inc.,* 11 Cal.4th 1, 36 (1995); *Love v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 1153 (1990) (a claim for breach of the covenant of good faith cannot be pursued in the absence of any substantive coverage under the policy, since the covenant cannot "be endowed with an existence independent of its contractual underpinnings"); *Guz v. Bechtel National, Inc.,* 24 Cal. 4th 317, 349 (2000). Additionally, even if the Court were to find for coverage and hence a duty to defend, there can be no question that Illinois Union cannot be subject to bad faith liability because Illinois Union's coverage position was reasonable.

Moreover, to withstand summary adjudication (and show a potential entitlement to an award of punitive damages and "Brandt" attorneys' fees), Young must offer admissible evidence going well beyond the question of merely whether Illinois Union breached the contract when it declined to cover the claim. Rather, Young must present a prima facie case that Illinois Union's conduct "demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an innocent mistake, bad judgment or negligence but by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." *Chateau Chamberay*

Homeowners Ass'n v. Associated Int'l Ins. Co., 90 Cal.App.4th 335, 346 (2001). Indeed, "[b]ecause the key to a bad faith claim is whether denial of a claim was reasonable, a bad faith claim should be dismissed on summary judgment if the defendant demonstrates that there was a 'genuine dispute as to coverage.'" *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 669-70 (9th Cir. 2003), quoting, *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001). Thus, an insurer is entitled to judgment where its handling of the claim was reasonable as a matter of law. See, e.g., *Lehto v. Allstate Ins. Co.*, 31 Cal.App.4th 60, 70 (1994); *Dalrymple v. United Services Auto. Ass'n*, 40 Cal.App.4th 497, 516 (1995). As Illinois Union's decision to decline coverage was reasonable and supported by the Policy, Young is not entitled to proceed with his causes of action for breach of contract and breach of the covenant of good faith and fair dealing.

6. YOUNG'S CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY AND CONSTRUCTIVE FRAUD MUST FAIL BECAUSE ILLINOIS UNION DID NOT OWE YOUNG A FIDUCIARY DUTY AND IN ANY EVENT NO COVERAGE IS AVAILABLE FOR THIS CLAIM

Young's third and fourth causes of action for breach of fiduciary duty and constructive fraud must fail because an insurer is not a fiduciary under California law. California appellate courts have held that insurers are not true fiduciaries of their insureds. The California Supreme Court's opinion in *Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal.4th 1142 (2001) eliminated breach of fiduciary duty claims by policyholders against insurers. *Vu* held that, while an insured has unequal bargaining power and must depend on the good faith of the insurance carrier, the insurance carrier is not a fiduciary and cannot be sued for breach of fiduciary duty. *Id.* at 1151.

Young's fourth cause of action for constructive fraud is founded upon an alleged fiduciary duty owed by Illinois Union as an insurance company to Young

as an insured under the Policy. As such, Young's cause of action for constructive fraud also fails due to the lack of a fiduciary relationship between Illinois Union and Young.

7. YOUNG'S FIFTH CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS NOT VIABLE

The tort of intentional infliction of emotional distress requires proof of "extreme and outrageous conduct" by the defendant "especially calculated to cause ... mental distress of a very serious kind." *Christensen v. Superior Court*, 54 Cal.3d 868 (1991). The conduct alleged must be "so extreme as to exceed all bounds of that usually tolerated in a civilized community" *Schlauch v. Hartford Acc. and Indem. Co.,* 146 Cal.App.3d 926 (1983). An insurance carrier's failure to pay a claim or its unreasonable investigation of a claim does not amount to the tort of intentional infliction of emotional distress. *Ricard v. Pacific Indemnity Co.*, 132 Cal.App.3d 886 (1982).

8. YOUNG'S SIXTH CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IS NOT VIABLE

In an insurance coverage action, the relationship between the parties is based on the insurance contract. Conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. *Erlich v. Menezes*, 21 Cal.4th 543 (1999). Negligence causes of action are not available against insurance carriers. *Sanchez v. Lindsey Morden Claims Services Inc.*, 72 Cal.App.4th 249 (1999); *Aceves v. Allstate Ins. Co.,* 68 E3d 1160 (9th Cir.1995).

Negligent infliction of emotional distress is not an independent tort but rather is based on the tort of negligence. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965 (1993). Just as negligence causes of action are not available against

insurance carriers, neither are purported causes of action for negligent infliction of emotional distress. *Soto v. Royal Globe Ins. Co.*, 184 Cal.App.3d 420 (1986).

9. YOUNG'S SEVENTH AND EIGHTH CAUSES OF ACTION FOR INTENTIONAL MISREPRESENTATION AND NEGLIGENT MISREPRESENTATION MUST FAIL AS THEY ARE MERELY A RECASTED CLAIM FOR BAD FAITH

As referenced above, there are only limited circumstances wherein a breach of contract claim can be converted into a tort claim. In his seventh and eighth causes of action, Young essentially recasts his claim for bad faith in the form of a claim for intentional or negligent misrepresentations premised on Illinois Union's implicit promise to honor the terms of the Policy. These causes of action are not viable as a matter of pleadings since they are merely a recast of the bad faith claim, which has been shown to be not viable. In an event, since there is no coverage for the Claim against Young in the Underlying Action, these causes of action must fail.

10. YOUNG CANNOT STATE A PROPER CAUSE OF ACTION FOR DECLARATORY RELIEF

Where, as here, there is no pending controversy there is no viable cause of action for declaratory relief. The fundamental basis of declaratory relief is the existence of an actual, present controversy. Witkin, California Procedure, 4th Ed., Pleading, Section 817. There is no present controversy on which the court can issue a declaratory judgment. Accordingly, Young's declaratory relief cause of action must fail.

11. YOUNG CANNOT RECOVER PUNITIVE DAMAGES AS A MATTER OF LAW

To recover punitive damages under Cal. Civil Code §3294, one must demonstrate by clear and convincing evidence that the defendant was

engaged in fraud, malice or oppression. California Civil Code § 3294(c) (1) defines "Malice" as "[d]espicable conduct which is carried on by the defendant with the willful and conscious disregard of the rights or safety of others." Section 3294(c)(2) defines oppression as "[d]espicable conduct that subjects a person to cruel and unusual hardship in conscious disregard of the person's rights." Fraud is defined in Section 3294(c)(3) as "an intentional misrepresentation, deceit, or concealment of a material fact known to defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

An insurer's conduct that is deemed unreasonable must be demonstrated in order to justify a finding of "despicable conduct" and thereby justify an award of punitive damages. *Shade Foods, Inc. v. Innovative Products & Sales Marketing, Inc.,* 78 Cal.App.4th 847, 891 (2000).

The imposition of punitive damages is disfavored and punitive damages should be permitted only in the "clearest of cases." *Henderson v. Security National Bank,* 72 Cal.App.3d 764, 771-72 (1977); *Woolstrum v. Mailloux,* 141 Cal.App.3d Supp. 1, 9 (1983). A right to punitive damages must be "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind." *Mock v. Michigan Millers Mut. Ins. Co.,* 4 Cal.App.4th 306, 332 (1992).

Young's prayer for punitive damages is based solely on Illinois Union's alleged breach of the Policy in failing and refusing to defend him in the Underlying Action. However, even a wrongful and unreasonable denial of benefits cannot, by itself, support a punitive damages award. See e.g., *Shade Foods, supra,* 78 Cal.App.4th 847. Here, there is simply no evidence of oppression, fraud or malice on the part of Illinois Union and certainly no evidence that Illinois Union's

declination of coverage was unreasonable as a matter of law.

IV. CONCLUSION

For the foregoing reasons, Illinois Union respectfully requests this Court to grant the instant Motion for Summary Judgment in its favor and against Young. Alternatively, Illinois Union respectfully requests this Court to summarily adjudicate each of the causes of action set forth in Young's Complaint and Young's claims for "Brandt" attorneys' fees and punitive damages in favor of Illinois Union.

Dated: July 22, 2008

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: _____

Herbert P. Kunowski, Esq.
Darren Le Montree, Esq.
Attorneys for Defendants

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, by WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER and am over the age of 18 and not a party to the within action. My business address is 555 South Flower Street, Suite 2900, Los Angeles, California 90071.

On July 22, 2008, I served the foregoing document described as **ILLINOIS UNION INSURANCE COMPANY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on all interested parties, through their respective attorneys of record in this action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Daniel L. Rottinghaus, Esq. Paul W. Windust, Esq. Berding & Weil LLP 3240 Stone Valley Road West Alamo, CA 94507	Attorneys for Plaintiff: ROBERT L. YOUNG Phone: (925) 838-2090 Fax: (925) 820-5592

XX (**BY MAIL**) I caused such envelope(s) fully prepaid to be placed in the United States Mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence or mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

___ (**BY E-MAIL**) I caused such document to be served via E-mail at Paul W. Windust [pwindust@berding-weil.com]

___ (**BY FACSIMILE**) I caused such document(s) to be telephonically transmitted to the offices of the addressee(s).

JURISDICTION

XX (State) I declare under penalty of perjury that the above is true and correct.

Executed on **July 22, 2008,** at Los Angeles, California.

Irene Guzman-Buelna